NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**FILED** Dec. 17, 1997
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Ray Watson,

Plaintiff-Appellant,

v.

University Medical Center;
Mike Parker;Bill Andrews,

Defendants-Appellees.

No. 96-17029
D.C. No. CV-95-00795-HDM

**MEMORANDUM***

Appeal from the United States District Court
For the District of Nevada
Howard D. McKibben, District Judge, Presiding
Submitted December 15, 1997 **

Before: SNEED, LEAVY, and TROTT, Circuit Judges.

Ray Watson appeals pro se the district courts' summary judgment in favor of defendants in his action alleging race discrimination in employment. We have jurisdiction pursuant to 28 U.S.C. § 1291. After a de novo review of the record, **see Forsyth v. Humana, Inc.**, 114 F 3d 1467, 1497 (9th Cir.), cert. denied, 1997 WL 592548 (U.S. Dec. 1, 1997) (No. 97-504), we affirm for the reasons stated in the district courts' order on September 6, 1996.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a);(9th Cir.)

A2

**ENTERED AND SERVED**
**Filed Sep - 6 1996**
Clerk U.S. District Court
District of Nevada
By s/_____ Deputy

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

Ray Watson, CV-S-95-795-HDM (RLH)

Plaintiff,

vs. ORDER

University Medical Center,
Mike Parker, Bill Andrews,

Defendants.

---

This action is before the court on defendants' motion for summary judgment (# 27). Plaintiff Ray Watson, proceeding in pro se, alleges that his former employer, University Medical Center (or "UMC") discriminated against him based on race when it failed to promote him to a full time security officer position, and when it subsequently terminated him.

Watson, and African American, was employed as a per diem security guard at University Medical Center from January 1992 until August 1993. In his periodic employee evaluations, Watson achieved at least satisfactory rankings in all areas of his work., and his supervisors made several complimentary comments about him. However, the record also identifies approximately ten occasions upon which he was reprimanded for disciplinary violations. In August 1993, two regular full-time security positions became available at UMC. Plaintiff applied for the positions. Despite his apparent seniority as a per diem guard, plaintiff was neither interviewed nor hired for the positions. UMC contends that

its decision was based upon a written survey of security supervisors, who were asked to evaluate the candidates for the full-time positions. According to UMC, Watson scored the lowest of the twelve applicants. UMC also contends that it attempted to contact Watson for an interview, but that he failed to return the calls. Watson disputes these facts. Subsequently, UMC determined that it did not wish to employ plaintiff any longer, and his name was removed from the call list for per diem guards.

Watson initiated grievance proceedings pursuant to a union agreement. After an initial hearing affirmed the actions of management, a second hearing officer concluded that there was no evidence of discrimination, and that UMC was justified in terminating Watson. However, he recommended reinstatement because the failure of UMC to interview its only African-American applicant may have had the appearance of discrimination. UMC did not follow the hearing officers' recommendation. Thereafter, Watson filed this action, alleging a federal claim for racial discrimination, and a pendant stage claim for breach of the union contract.

To maintain an action for racial discrimination under Title V11, a plaintiff must prove, either directly or indirectly, that the employer intentionally discriminated against him or her on the basis of race. The familiar test from McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973), was recently restated by the Ninth circuit in **Warren v. city of Carlsbad,** 58 F 3d 439, 441 (1995):

> A plaintiff can establish a prima facie case of discrimination under Title V11 by establishing that (1) he or she belongs to a racial minority; (2) he or she has applied and was qualified for a job which the employer was seeking applicants; (3) he or she was rejected for the position despite his or her qualifications; and (4) the position remained open after his or her rejection and the employer continued to seek applications from other people with similar qualifications to the plaintiff.

Because the **McDonnell Douglas** test was meant to be flexible in its application, the fourth element may also be met when the position is given to an individual who is not of the same race as the plaintiff. **Cf. Lynn v. Regents of the Univ. of Calif.,** 656 F 2d 1327,1343 (9th Cir.1981); **Hagans v. Clark,** 752 F 2d 477, 482 (9th cir. 1985).

Plaintiff appears to have satisfied the **Mcdonnel Douglas** test. First, it is not disputed that he is an African-American. Second, he establishes that he was qualified for the full-time security officer position by providing copies of his periodic employee evaluations, both of which rated him as a satisfactory per diem guard. Third, it is not disputed that plaintiff was rejected for the position, and ultimately had his name removed from the call list of per diem guards. Finally, plaintiff alleges by affidavit that neither of the two applicants who were hire into full-time positions were African-Americans.

Once the plaintiff has established a prima facie case of discrimination, the employer May dispel the inference of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action that was adverse to plaintiff. **Warren** 58 F 3d at 442. If the employer is able to meet its burden, then "the plaintiff has the opportunity to present evidence showing that the employers' stated reason was merely pretextual". ***Id*** at 442. (quoting **Lindahl v. Air France,** 939 F 2d 1434, 1437 (9th Cir. 1991).

As a legitimate, nondiscriminatory motive for not hiring Watson as a full-time security guard, UMC argues that it conducted a written survey of Lead security officers and Lieutenants, and that Watson received the lowest rating of the twelve applicants in the areas that were evaluated. UMC also points to Watsons' prior disciplinary record involving approximately ten infractions. As an explanation for removing Watsons' name from the per diem call list, UMC contends that it would have been required by union contract to offer plaintiff the next available full-time position, regardless of his merit, if he exceeded 2080 per diem hours. Watson worked approximately 2040 yours.

UMC argues that it did not want its next full-time officer determined by operation of the union contract, especially in light of Watsons' ratings.

In an effort to demonstrate that these reasons were merely pretextual excuses for the adverse actions, Watson argues that the written evaluations were part of a conspiracy to deprive him of the position. In support of this contention, Watson offers the affidavit of one of his former supervisors, who stated that he was not asked to fill-out an evaluation. He also notes that the surveys were unsigned and undated, and accordingly unreliable assessments of his work.

The fact that the evaluations were unsigned and undated, by itself, is insufficient to establish a conspiracy. Watson has had the opportunity to seek complete information concerning the evaluations and their authors through the course of discovery, but has failed to present any evidence of a conspiracy to discriminate against him. Rather, the informal survey demonstrates the efforts that security supervisor Michael Parker took to make sure that the applicants were objectively scored and evaluated by several supervisors on an array of factors. Further, Parker states in his affidavit that, of the supervisors who evaluated the applicants, two were Caucasian, two were African-American, one was Asian, and one was Hispanic.

Watson also contends he was the only African-American who applied for this position, and that he was not even asked to interview. UMC offers proof through the sworn affidavits of John Seeno and Francene Quick that it attempted to contact him, and that a message was left at his residence. In response, Watson offers the affidavit of his wife Londa Francis, who stated that no one called regarding an interview. However, in her deposition, Francis said she often took messages from UMC during this time period without being told exactly why they were callir.g.

On these facts, even when all inferences are reasonably drawn in Watsons' favor, Watsons' opposition lacks the kind of substantive evidence that the Ninth Circuit found to support the inference of pretextual dismissal in **Warren.** See 58 F3d at 443. Fro example, there are no statistics suggesting a pattern of discriminatory practice at UMC. To the contrary, the affidavit of

UMC argues that it did not want its next full-time officer determined by operation of the union contract, especially in light of Watsons' ratings.

In an effort to demonstrate that these reasons were merely pretextual excuses for the adverse actions, Watson argues that the written evaluations were part of a conspiracy to deprive him of the position. In support of this contention, Watson offers the affidavit of one of his former supervisors, who stated that he was not asked to fill-out an evaluation. He also notes that the surveys were unsigned and undated, and accordingly unreliable assessments of his work.

The fact that the evaluations were unsigned and undated, by itself, is insufficient to establish a conspiracy. Watson has had the opportunity to seek complete information concerning the evaluations and their authors through the course of discovery, but has failed to present any evidence of a conspiracy to discriminate against him. Rather, the informal survey demonstrates the efforts that security supervisor Michael Parker took to make sure that the applicants were objectively scored and evaluated by several supervisors on an array of factors. Further, Parker states in his affidavit that, of the supervisors who evaluated the applicants, two were Caucasian, two were African-American, one was Asian, and one was Hispanic.

Watson also contends he was the only African-American who applied for this position, and that he was not even asked to interview. UMC offers proof through the sworn affidavits of John Seeno and Francene Quick that it attempted to contact him, and that a message was left at his residence. In response, Watson offers the affidavit of his wife Londa Francis, who stated that no one called regarding an interview. However, in her deposition, Francis said she often took messages from UMC during this time period without being told exactly why they were calling.

On these facts, even when all inferences are reasonably drawn in Watsons' favor, Watsons' opposition lacks the kind of substantive evidence that the Ninth Circuit found to support the inference of pretextual dismissal in **Warren.** See 58 F3d at 443. Fro example, there are no statistics suggesting a pattern of discriminatory practice at UMC. To the contrary, the affidavit of

Michael Parker demonstrates that at least two African-American, on Asian-American, and one Hispanic held supervisory positions within the security department of UMC at the time of Watsons' termination. Further, Parkers' affidavit shows that there were twenty-five full-time security guards employed at that time, "comprising fourteen whites, six blacks, three Hispanics, and two Pacific Islanders." Ex. D to motion (#27).

Also, as discussed above, Watson has not reasonably challenged the objectivity of the evaluations, and there is no other evidence of discrimination in the workplace (such as derogatory racial comments). **See Warren.** 58 F3d at 443.

Plaintiff also alleges breach of employment contract. Plaintiff conceded several times in his deposition that he was an at-will employee, and the union agreement under which he was employed expressly states the same. While Article 11 of the contract states that per diem employees are covered by certain contract provisions, none of those provisions give rise to a contract for continued employment for the per diem employee. In relation to this lawsuit, Watson was protected by the contract only Insofar as racial discrimination was prohibited in employment practices. Thus, because there has not been a sufficient showing of discrimination to survive summary judgment, there is also no basis for Watsons' contract claim.

Accordingly, defendants' motion for summary judgment (#27) is granted, and defendant Bill Andrews' separate motion for summary judgment on the issue of absolute and qualified immunity (#37) is denied as moot.

It is so ORDERED,

Dated this 30th day of August, 1996,

/s _____
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**FILED Mar 27, 1998**
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Ray Watson,
Plaintiff-Appellant,

v.

University Medical Center;
Mike Parker; Bill Andrews,
Defendants-Appellees.

---

Before: SNEED, LEAVY, and TROTT, Circuit Judges

Appellants' motion for publication is denied. The panel has so voted to deny appellants' petition for rehearing. Judge Trott has voted to reject the suggestion for rehearing en banc, and Judges Sneed and Leavy have so recommended.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to her hear the matter en banc. See Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

A8

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**
(Filed 12/17/97)

| | |
|---|---|
| Ray Watson<br>Appellant,<br>Vs<br><br>University Medical Center,<br>Mike Parker, Bill Andrews,<br>Appellees. | No. 9617029<br><br>CV-S-95-795 HDM(RHL) |

APPEAL FROM the United States District Court for the District of Nevada (Las Vegas). THIS CAUSE came to be heard on the TRANSCRIPT OF Record from the United States District Court for the District of Nevada (Las Vegas) and duly submitted.

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this court, that the judgment of said district court in this cause be and hereby AFFIRMED.

Filed and entered 12/17/97

**A9**

MEMORANDUM
SECURITY SERVICES

To: Blain Claypool, Associate Administrator
From: Michael Parker, Director of Security Services
Subj: Employee Selection Process
Date: August 24, 1993

In reviewing the applicants for the full time employee position, I decided that it would be best to get input from the Lieutenants and Lead Security officers. I like to include them in the decision making process whenever I can so that we build a team relationship. I explain to them that I take their input with high regard but the final question is my responsibility.
Those present for this process were:

| | | |
|---|---|---|
| Lt Ken Allgood | Lt. John Seeno | Lt. Cliff Ortego |
| **S/O Larry Mathis** | S/O Ed Yesko | S/O Newton Yuen |

I provided a form to each of these persons, which I made using the UMC evaluation form as a format. They were seated and told not to discuss their feelings or judgment with each other. I instructed them to fill out the forms using a scale of 1 to 10 (using 10 as best) in each of the categories listed. They were also instructed that if they felt they could not honestly grade on an individual for any reason that they should leave the form blank.

When I collected the forms, I simply added the scores and then averaged those figures. I averaged so that if one officer was graded by six persons and another officer was graded by three, it would be fairly analyzed.
The twelve per diem officers were graded in the following order:

| | | | |
|---|---|---|---|
| 1) Lester Rowe | (63) | 2) Brian Dias | (60) |
| 2) David Vernon | (55.4) | 4) Warren Brenn | (55.4) |
| 5) Mark Ballard | (55.5) | 6) Wayne Smith | (51.6) |
| 7) John Villano | (50.6) | 8) Chris Bubel | (49.1) |
| 9) Lee Cain | (47) | 10) Don Hale | (44.75) |
| 11) Calvin Wallace | (42.2 | 12) Ray Watson | (36.5) |

**A10**

The officers graded as number two (2) Mr. Brian Dias( a Pacific Islander), and number four (4) Mr. Warren Brenn (a Caucasian), were selected for the full time positions.

**A11**

**Affidavit of Michael Parker**

State of Nevada)
)SS:
County of Clark)

**Michael Parker**, being duly sworn deposes and states as follows:

1. That your affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.
2. That your affiant makes this affidavit in support of Defendants' Motion for Summary Judgment.
3. That the one of the two officers selected for the full time position was Pacific Islander, and the other officer selected was Caucasian.
4. That the job description for the position held by the plaintiff required a valid Nevada Drivers License. (Exhibit "A" Attached)
5. That at the time which all eligible candidates were evaluated for the Full time position, Mr. Larry Mathis was present and participated in the Evaluation process.

Further Affiant Sayeth Naught

/s _____ /s Claudette Harrington
Michael Parker Notary Public

**AFFIDAVIT OF JOHN SEENO**

State of Nevada )
SS:
County of Clark )

John Seeno, being first duly sworn disposes and states as Follows:

1. That your Affiant is over the age of eighteen (18) years and is a resident of Clark, Nevada.
2. That your Affiant makes this Affidavit is support of Defendants' Motion for Summary Judgment.
3. That your affiant is a Security Lieutenant at University Medical Center.
4. That in order to schedule Ray Watson for an interview regarding a full-time security position to be is August of 1993, your Affiant attempted to call Mr. Watson during affiant' regular scheduled shifts on Wednesday Thursday evening. Affiant spoke to a woman and asked her to have Mr. Watson either call Affiant or the directors' office at his Earliest convenience.

FURTHER AFFIANT SAYETH NAUGHT

/s _____
John Seeno

Subscribed and Sworn to before me
This 29th day of February, 1996.
/s Jeannette Bertoch
NOTARY PUBLIC in and for Said
County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
Jeannett E. Bertoch
My Appointment Expires July 22, 1998

**A13**

**AFFIDAVIT OF KATHY SILVER**

State of Nevada )
) SS:
County of Clark )

Kathy Silver, being first duly sworn deposes and states As follows:

1. That your Affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.
2. That your Affiant makes this Affidavit in support of Defendants' motion for Summary Judgment.
3. That your Affiant was Senior Associate Administrator, Marketing and Human Resources at University Medical Center.
4. That your Affiant attended a meeting with Mike Parker, Director of Security Services at UMC; Blain Claypool, Assistant Administrator at UMC; Ray Watson and Carlos Henderson, CCPEA Representative. Affiant states that during this Meeting, and offer of employment, , as a per diem Security officer at zero hours, was made to Ray Watson.

FURTHER AFFIANT SAYETH NAUGHT

/s _____
Kathy Silver

SUBSCRIBED AND SWORN to before me
This 1st day of March , 1996.
/s Linda Lewis
NOTARY PUBLIC and for said
County and State

**A14**

## DECLARATION OF FRANCINE QUICK

I Francene Quick declare as follows:

1: Declarant is over eighteen (18) years.

2. Declarant currently resides at 3725 W. Harbor, Bettendorf Iowa, 52722.

3: Declarant makes this Declaration in support of defendants' Motion for Summary Judgment.

4: Declarant was a Security Secretary at University Medical Center.

5. In order to schedule Ray Watson for an interview regarding a full-time security position to be filled on August of 1993, Declarant attempted to call Ray Watson on Wednesday Afternoon, all day Thursday and Friday morning.

6. Declarant left several messages to call the directors' office at his earliest convenience. Declarant did not talk to Mr. Watson personally until Friday around noon when he returned Declarants' calls.

7. I declare under penalty of perjury under the laws of the state of Nevada that the foregoing is true and correct and that this Declaration was executed on the 3rd day of March, 1996, Battendorf, Iowa.

/s _____
Francene Quick

Brian C. Whitaker, Esq.
Rawling, Olson, Cannon.
Gromley & Desruisseaux
301 Clark Avenue, Suite 1000
Las Vegas, Nevada 89101
(702)384-4012

Attorneys for Defendants
University Medical Center,
Mike Parker, Bill Andrews

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OD NEVADA**

| | |
|---|---|
| Ray Watson,<br><br>Plaintiff,<br><br>v.<br><br>University Medical Center,<br>Mike Parker, Bill Andrews.<br><br>Defendants. | Case No. CV-5-95-795 (RLH) |

**ANSWER TO SECONDED AMENDED COMPLAINT**
(Jury Trial Requested)

COME NOW Defendants, University Medical Center, Mike Parkerand Bill Andrews, and answer Plaintiffs' Seconded Amended Complaint as Follows:

FOURTH DEFENSE

Answering paragraph 9 of Plaintiffs' First Cause of Action, Defendants admit that a decision was rendered by University Medical Center Hearing Officer Bill Andrews in which he indicated that he felt Plaintiff should be reinstated on a per diem basis with " the opportunity to improve on weaknesses as stated in the management review, and if full improvement

is made, he should be given an interview on the next full-time opening in the department". Plaintiff was offered a new per diem employee position, but such position was rejected. Defendant denies each and every remaining allegation set forth in paragraph 9 of plaintiffs' complaint.

Defendants respectfully request a trial by trial in this action.

DATED this 7th day of February, 1996
Rawlings, Olson, Cannon
Gromley & Desruisseaux

/s _____
Brain C. Whitaker, Esq.

**A17**

University Medical Center
Grievance Hearing
File: Grieve \Watson

To: Diana Streuber, Chief Steward CCPEA
From: Bill Andrews, Internal Auditor \Hearing Officer
Subject: Ray Watson's Grievance (2d Step)
Date: November 9, 1993

---

On November 4, 1993, at 10:30 AM, a hearing was held for Ray Watsons' grievance. Mr. Watson was a per diem security officer for the hospital. Mr. Watson is claiming discrimination for not being interviewed for a full-time position as a security officer. He wants reinstatement as a full-time employee with back pay.

Evidence and testimony were reviewed in connection with the discrimination claim by Ray Watson. Present at the hearing were the grievant; Carlos Henderson, CCPEA rep; and Mike Parker, Director of Security.

In reviewing the written evidence and testimony, I have found the following:

(1) There is no written policy at UMC stating that an applicant for a job is assured and interview.

(2) Mr. Parker submitted sufficient documentation stating why Mr. Watson was not interviewed for the full-time position. (such as: divulging privileged information, improper processing of patients' personal property, and per diem employees evaluation done by department supervisors ranking him 12 out of 12)

(3) There were 7 or 8 applicants, including Mr. Watson, sent to Mr. Parker for an interview. All were interview for the position except Mr. Watson. Mr. Watson was the only African-American who applied. This <u>may give the appearance of discrimination.</u>

Based on the testimony and evidence presented, I feel that Mike Parker did not discriminate on the basis of race. Although as stated before, it may give the appearance of discrimination since Ray Watson was the only African-American who was recommended for an interview and did not get one. I feel UMC Administration should write a policy for the criteria to receive an interview. Also, reinstate Ray Watson on per diem with the opportunity to improve on weaknesses as stated in the Management Review, and if improvement is made, he should be given an interview for the next full-time opening in the department. Mr. Watsons' request to be reinstated as a full-time employee with back pay is denied.

Cc: Bernard Turk, Director of Labor Relations
Jean Harper, Coordinator of Labor Relations
Mike Parker, Director of Security
Blain Claypool, Assistant Administrator

A19

**Affidavit of Londa Francis**

State of Nevada )
) SS:
County of Clark )

Londa Francis, being first duly sworn deposes and states as follows:

1. That your affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.

2. That your affiant makes this affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

3. I am the only female residing at Ray Watson's residence and no one ever called me regarding any job interviews at the University Medical Center.

Further Affiant Sayeth Naught.

/s_____
Londa Francis

SUBSCRIBED AND SWORN to and before me
this 5th day of May, 1996.
/s Angela Desmoni
Notary Public In and For Said
County and State

A20

**Affidavit of Carlos Henderson**

State of Nevada ,
) SS:
County of Clark )

Carlos Henderson, being first duly sworn deposes and states as follows:

1. That your affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.
2. That your affiant makes this affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

3. That I am a CCPEA Representative and represented Ray Watson in grievance meetings occurring on September 7, 1993 and November 4, 1993.

4. That Mike Parker and UMC submitted information to Hearing Officer William Andrews, who rendered and decision that Watson be re-instated.

5. That I met with Mike Parker, Kathy Silver and Ray Watson in an informal meeting. At no time was Watson offered any "per diem security position at zero hours".

Further Affiant Sayeth Naught.
/s_____
Carlos Henderson

SUBSCRIBED AND SWORN to and before me
this 30 th day of May, 1996.
/s Bernard Turk
Notary Public In and For Said
County and State

**A21**

**Affidavit of Ray Watson**

State of Nevada )
) SS:
County of Clark )

Ray Watson, being first duly sworn deposes and states as follows:

1. That your affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.

2. That your affiant makes this affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

3. That Defendants never called my residence to inform or schedule me for a job interview regarding any full-time security positions to be filled at University Medical Center.

4. That based on Article 11, par. 3 of CCPEA union contract, and for the articles of the contract that were actionable, I am not an at will employee.

Further Affiant Sayeth Naught.

/s_____
Ray Watson

SUBSCRIBED AND SWORN to and before me this 5th day of May, 1996.
/s Angela Desmoni
Notary Public In and For Said
County and State

A22

## Affidavit of Larry Mathis

State of Nevada )
) SS:
County of Clark )

Larry Mathis, being first duly sworn deposes and states as follows:

1. That your affiant is over the age of eighteen (18) years and is a resident of Clark County, Nevada.

2. That your affiant makes this affidavit in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

3. That I was a Lead Security Officer at University Medical Center and supervised Ray Watson.

4. That I was not asked, nor did I participate in Mike Parker's evaluation process of the eight per diem security officer who applied for the full-time security position.

Further Affiant Sayeth Naught.

/s_____
Larry Mathis

SUBSCRIBED AND SWORN to and before me
this 4th day of May , 1996.
/s Louise Sanders
Notary Public In and For Said
County and State